

IN THE MATTER OF: Financial Advisers Act 2008

BETWEEN: FINANCIAL MARKETS AUTHORITY

Complainant

AND: W

Respondent

Committee Panel: Hon Sir Bruce Robertson (Chairman)  
Tracey Berry  
Sarah-Jane Weir

Registrar: Ariarna Hakaraia

Counsel: Simon Chapman for the Complainant  
Lisa Hansen for the Respondent

Date of hearing: 10 December 2020

Final written submissions: 22 December 2020

Date of decision: 20 January 2021

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**DECISION OF THE COMMITTEE AS TO CODE STANDARD BREACHES**

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## EXECUTIVE SUMMARY

1. The Financial Advisers Disciplinary Committee (**Committee**) finds that the Respondent has breached Code Standards (**CS**) under the Code of Professional Conduct for Authorised Financial Advisers (**Code**). Its findings are summarised as follows:
  - 1.1. The Respondent breached CS 12 and 15 of the Code;
  - 1.2. The breaches are established in respect of three clients, whose identities are permanently suppressed;
  - 1.3. It consists of the Respondent having failed:
    - a. To record in writing adequate information about a personalised service provided to a retail client.
    - b. To demonstrate adequate knowledge of the relevant legislative obligations which result from the term 'personalised service'.
2. This is a case about breaches of the Code. It is not about the integrity of the Respondent and there is no suggestion that she has improperly benefited at the expense of her clients, or that any client has been disadvantaged. But, the provisions of the Code are fundamental and adherence to them is always required.
3. The parties should file submissions as to disposition. The Complainant's submissions should be filed by Friday, 5 February 2021 and the Respondent's submissions should be filed by Friday, 26 February 2021.

## REASONS FOR DECISION

### THE COMPLAINT AND ITS PROGRESS TO HEARING

4. A complaint against the Respondent was referred to the Committee by letter of 4 March 2020, alleging breaches of CS 12 and 15 of the Code. The Financial Markets Authority (**FMA**) initiated the complaint. It related to services the Respondent provided to six named clients in four client files.
5. On 11 March 2020 a panel of the Committee found that a hearing was necessary and resolved that a Notice of Complaint should be served.
6. Subsequent telephone conferences led to the matter being timetabled. Due to Covid-19 and some personal difficulties of the parties, the matter was regrettably delayed. The parties were unable to narrow the scope of the alleged CS breaches or negotiate an agreed summary of facts, but eventually submitted an agreed list of issues to be tested at a hearing although even this was modified and revised on the day of the hearing.
7. Witness statements were received from the following:
  - a. A Senior Investigator in the Complainant's Evidence and Investigations Team;
  - b. Two Senior Advisers in the Complainant's Supervision Team;

- c. The Respondent;
  - d. Two clients of the Respondent.
8. Only the Respondent's witnesses were required at the hearing for cross examination.
9. A substantial amount of documentary evidence was provided to the Committee in support of the complaint and no objection was taken to the reliability of that which was presented in the form of an agreed bundle. It has been treated as evidence admitted by consent.
10. Both parties filed comprehensive written submissions and the Committee had the benefit of oral submissions during a day-long hearing, and subsequent written closing submissions. The Committee thanks counsel for their submissions and assistance in answering the Committee's questions.

### **Agreed list of issues**

11. At the oral hearing, the matters at issue agreed between the parties were:

#### **Breaches of CS 12**

- A. In relation to Client File 1, with respect to the record dated 29 September 2017:

- 1. Whether the Respondent provided a personalised service:
  - a. Whether the Respondent provided a financial adviser service (i.e. financial advice) in relation to the clients;
  - b. Whether the Respondent took into account the client's particular financial circumstances or goals; or the clients reasonably expected the Respondent to have done so.
- 2. If a personalised service was provided, whether the Respondent's records in respect of the client were adequate or inadequate in relation to:
  - a. The scope of the financial service provided, including any limitations on the advice;
  - b. Any evidence the clients understood any limitations on the advice;
  - c. The basis for the advice provided, including any research or analysis of existing or comparable products; and
  - d. The suitability of the product for the client.

- B. In relation to Client File 2, with respect to the discharge of the mortgage and the retention of the 'Sovereign Home Plan' insurance product:

- 1. Whether the Respondent provided a personalised service:
  - a. Whether the Respondent provided a financial adviser service (i.e. financial advice) in relation to the clients;
  - b. Whether the Respondent took into account the client's particular financial circumstances or goals; or the clients reasonably expected the Respondent to have done so.

2. If a personalised service was provided, whether the Respondent's records in respect of the client were adequate or inadequate in relation to:
  - a. The nature and scope of the financial service provided;
  - b. For discharging the mortgage: the basis for the advice provided, including any research or analysis of existing or comparable products; and
  - c. For retaining the insurance: whether the Respondent provided an explanation to enable the client to make an informed decision.
  
- C. In relation to Client File 3, with respect to the records dated 12 October 2017, 15 November 2017, 21 August 2018 and 26 October 2018, each time in relation to the client balancing her portfolio:
  1. It was accepted that a personalised service was provided, whether the Respondent's records in respect of the client were adequate or inadequate in relation to:
    - a. The scope of the financial service provided, including any limitations on the advice;
    - b. The suitability of the service for the client; and
    - c. Whether the Respondent provided an explanation to enable the client to make an informed decision.
  
- D. In relation to Client File 4, with respect to the record dated 18 October 2018 that the client sell shares in ProTen Limited:
  1. Whether the Respondent provided a personalised service:
    - a. Whether the Respondent provided a financial adviser service (i.e. financial advice) in relation to the client;
    - b. Whether the Respondent took into account the client's particular financial circumstances or goals; or the client reasonably expected the Respondent to have done so.
  
  2. If a personalised service was provided, whether the Respondent's records in respect of the client were adequate or inadequate in relation to:
    - a. The scope of the financial service provided, including any limitations on the advice, and whether they were agreed to by the client.
  
  3. In relation to the records dated 28 November 2018, 7 December 2018 and 22 February 2019 that the client acquire investments in Castle Point Trans-Tasman Fund, Castle Point Ranger Fund and Russell Investments Fixed Interest Fund, whether the Respondent provided a personalised service:
    - a. Whether the Respondent provided a financial adviser service (i.e. financial advice) in relation to the clients;
    - b. Whether the Respondent took into account the client's particular financial circumstances or goals; or the clients reasonably expected the Respondent to have done so.
  
  4. If a personalised service was provided, whether the Respondent's records in respect of the client were adequate or inadequate in relation to:
    - a. The scope of the financial service provided, including any limitations on the advice;
    - b. Any explanation as to any limitations on the advice;

- c. Any research on the “state of the market”; and
- d. The suitability of the product for the client.

### **Breaches of CS 15**

Whether the Respondent has demonstrated an adequate knowledge of the Act, Code and other relevant legal obligations which result from the following terms:

- a. Financial advice;
- b. Personalised service; and
- c. Client.

### **FACTUAL FINDINGS**

#### **Litigation environment**

12. As the oral hearing progressed, and we were able to get beyond the avalanche of words, it became apparent that the Respondent was of the view that she was not providing financial advice by a personalised service unless and until she had received and documented the entire circumstances of a client, including their existing financial position and its makeup and she had an appreciation of their goals and aspirations.
13. We accept the submissions of the FMA, that the Code does not create such an approach. It is of course prudent and sensible to have the whole picture and that is what a wise adviser will do, but it does not mean any advice given preliminary to that is never a personalised service. The Respondent’s records were less than straightforward. The task for us is whether in each of the individual circumstances which have been put under the microscope a personalised service was being provided on a sensible objective basis. The perception of Respondent of what she was doing is not conclusive. The records which she is required to maintain must in and of themselves provide a comprehensive picture of the relationship and what was occurring. They are not merely for her benefit, but have a wider purpose under the Code.

#### **Factual background**

14. The Respondent is an AFA and was registered on the Financial Service Provider Register (**FSPR**) in 2011. Currently, the Respondent is authorised to provide financial advice and investment planning services.
15. The Respondent provides a range of services including financial advice, financial planning, investments, mortgage broking, KiwiSaver, retirement planning, residential property management and personal and small business tax advice (as a tax agent) through her business. The Respondent trades under three businesses, one of which is registered on the FSPR in 2011 as an employer or principal of a financial adviser and/or Qualifying Financial Entity.
16. In January 2018 the Complainant received a complaint in respect of the Respondent’s financial adviser practice. That complaint is not relevant to the referral, but prompted a monitoring visit by the Complainant.

17. The Complainant reviewed a sample set of Respondent's client files during the course of a monitoring visit (on 15-16 May 2019) at the Respondent's offices, and subsequently by way of desk based review of the client files (on 10-12 July 2019).
18. As a result of that review, the Complainant commenced an investigation on 23 August 2019. The Complainant interviewed the Respondent on 16 October 2019 and obtained further information from her, pursuant to s 25 of the Financial Markets Act 2011 (FMA Act), on 1 November 2019.

### **Interpretation of CS 12 and the threshold question**

19. CS 12 provides:

*An Authorised Financial Adviser must record in writing adequate information about any personalised services provided to a retail client.*

20. The additional provision under CS 12 is:

*The information required to be recorded under this Code Standard in relation to each retail client must be sufficient to demonstrate compliance with Code Standards 5-10, and must include copies of all information and documents provided to, or received from, the client in writing, in connection with the AFA's personalised services.*

21. As CS 12 applies when an AFA provides a personalised service to a retail client, these terms must be satisfied before considering whether the written records in relation to each client are adequate to demonstrate compliance with CS 5-10.
22. Under s 10 of the Act, a person gives financial advice if they make a recommendation or give an opinion in relation to acquiring or disposing of (including refraining from acquiring or disposing of) a financial product. A person does not give financial advice if they merely provide information (for example, the cost or terms and conditions of a financial product), make a recommendation or give an opinion relating to a class of financial products or about the procedure for acquiring or disposing of a financial product, or if they transmit the financial advice of another person or recommend that a person consult a financial adviser.

### **Interpretation of CS15**

23. CS 15 states:

*An Authorised Financial Adviser must have a knowledge of the Act, the Code, and other legal obligations relevant to the operation of the Authorised Financial Adviser's practice as a financial adviser (including relevant consumer protection laws), that is adequate for the proper operation of that practice.*

24. At issue before the Committee is whether the Respondent has demonstrated an adequate knowledge of the Act, the Code and any other relevant legal obligations which flow from the following terms:
  - a. Financial advice;

- b. Personalised service;
- c. Client.

### **Factual assessment**

25. The provisions of the Code are clear and unequivocal and the core task for the Committee is to determine the factual situation to which they are to be applied. This is a robust, realistic and common sense exercise. We are not involved in a semantic puzzle or counting angels on the head of a pin. Having regard to the nature and function of the legislation, what is a sensible application of the one to the other?

### **Demonstrating an adequate knowledge of the Code**

26. There are three alleged breaches of Code Standard 15. The Committee is forced to conclude that the Respondent had a somewhat idiosyncratic approach to record keeping and generally did not respond to the requirements of the Code with sufficient rigour. We repeat this was not sinister but there was confusion and some conflating of approaches and demands, which is regrettable.
27. Financial advice. On balance we are satisfied that the Respondent does understand this concept. We have carefully assessed what she said at the oral hearing and what is recorded in the Section 25 interview although some of the latter we discount as the interview was not a good exchange and at times became rather too adversarial. We accept that she knows that recommending acquisitions or retentions of financial products is financial advice.
28. Personalised service. We are led to the inevitable conclusion that the Respondent does not have a sufficient grasp or understanding of this critical concept. As previously noted there seemed to be a misplaced belief that unless and until the entire circumstances of a client were before her she was not providing a personalised service. That is not what the Code prescribes. A personalised service can be provided when only part of the environment is available. If in making a recommendation regard is had to part only of the client's circumstances or she knows merely some goals she can still be providing a personalised service. The concept is much more far reaching and encompassing.
29. Client. The evidence advanced by the FMA does not on balance satisfy us that the Respondent does not understand this concept. There is a need for a proper alignment of her practice with the current provisions of the Code but we are not persuaded that there is a failure to understand the fundamentals of this.

### **Maintaining adequate records**

#### **Client File 1**

30. In relation to Client File 1, with respect to the record dated 29 September 2017, the issue is whether the Respondent provided a personalised service and if so, whether the records in respect of the client were adequate.

31. The clients, who had a long-standing personal relationship with the Respondent, were in the process of moving abroad, and sought guidance from the Respondent on existing life insurance policies (amongst other matters).
32. We find that the clients in essence declined the offer of personalised advice by failing to provide the information requested by the Respondent as they “could see no justification or value in incurring this cost” as it related to the review of their insurance policies. The record dated 29 September 2017 provides “limited advice/read almost none” was given, and we find that on the balance of probabilities a personalised service did not occur, and nor did the clients reasonably expect it to have occurred.
33. Rather, advice that was provided was for a class of persons similar to that of the clients, being of a certain age and build, and the ongoing insurability for this class of persons. Class advice allows for general recommendations, and we accept that the Respondent did in this instance qualify the limitations of her advice sufficiently for the clients to have understood (notwithstanding the overall poor use of terminology).
34. It is suggested that the Respondent’s poor application of the use of ‘limited advice’ in her record of advice has complicated her own, and potentially the FMA’s understanding of the services being provided. The Respondent would have been wise to consider renaming her documentation and processes to ensure adequate reference to class advice, to avoid client, self or other perception that ‘limited advice’ implies the provision of ‘limited personalised advice’ per the FMA’s guidance note.
35. On the basis that a personalised service has not been established, the other issues do not arise and no breach of CS 12 exists.

#### **Client File 2**

36. In relation to Client File 2, with respect to the discharge of the mortgage and the retention of the ‘Sovereign Home Plan’ insurance product, whether the Respondent provided a personalised service and if so, whether the Respondent’s records in respect of the client were adequate in relation to:
  - a. The nature and scope of the financial service provided;
  - b. For discharging the mortgage: the basis for the advice provided, including any research or analysis of existing or comparable products; and
  - c. For retaining the insurance: whether the Respondent provided an explanation to enable the client to make an informed decision.
37. The Respondent has a long-standing professional relationship with the clients over some 37 years. The extent of this professional relationship is extensive, covering advice and guidance on property, tax and financial matters.
38. For the matter of the Sovereign Home Loan insurance plan, we find that the Respondent did provide a personalised service. That FMA has satisfied us that the advice provided and recorded in the “pink sheet” (the Respondent’s preferred method for documenting notes) on 9 August

2017, and the Respondent's own admission of a personalised service having occurred in the section 25 interview, means advice was provided to 'keep' the Sovereign Home Loan insurance plan.

39. Furthermore, the client in her witness interview confirmed her request for the Respondent to "look into it" noting she "couldn't afford it". It is clear from the documentation that advice was provided for the client to retain this policy, which the client did, for a limited time – later disposing of it independently based on unaffordability.
40. We reject the Respondent's argument that the failure to obtain full and recent information negates a personalised service having occurred.
41. Were the records for this personalised service adequate? Overall the quality of records supplied for the clients are convoluted and incomplete. It would seem that the Respondent has relied on the long-standing nature and inherent information understood on the clients, rather than retention of adequate records to evidence this.
42. No record of service for the scope and nature of advice was retained or obtained in support of the personalised service provided on 9 August 2017, as required by CS 8. In addition, we agree with the FMA that written records were either insufficient or absent to satisfy the requirement under CS 10 to provide an explanation sufficient for the clients to make an informed decision to retain the insurance policy. On that basis, we conclude that the records kept were inadequate, and that a breach in respect of CS 12 is made out.
43. In respect of the discharge of the mortgage FMA argues that this is a financial product and that the explanation of a process to discharge a mortgage was an opinion about it.
44. We find however, the Respondent provided only information about a process related to a financial product, and this is not into itself a personalised service. At best, we consider a class service may have occurred, as it relates to the recommendation for a class of persons with a repaid loan, with information provided on the procedure for discharge. The procedures for acquiring or disposing of a financial product is not financial advice and so no breach of CS 12 exists.

### **Client File 3**

45. In relation to Client File 3, with respect to the records dated 12 October 2017, 15 November 2017, 21 August 2018, 12 December 2017 and 26 October 2018, which were concerned with balancing of the portfolio. The issue is whether a personalised service was provided and if it was whether the records were adequate.
46. The Respondent acknowledges that she provided a personalised service to the client and she has since 1993.
47. During 2017 and 2018, the Respondent and the client met together in person or by telephone on at least four occasions. On each occasion her investment in NZ Funds Management including a

recommendation to rebalance her portfolio was discussed, sometimes as part of wide-ranging discussions about the client's circumstances.

48. The FMA submits that on each of those occasions, the Respondent provided a personalised service, and that the Respondent's client file is inadequate under CS 12 in that there is no clear record of the scope or nature of the advice, as is required by CS 8. We agree. We do not find that the scope of service dated 12 December 2017 adequately records in a comprehensible manner the scope of the service that the Respondent was undertaking for the client over the course of these meetings. Nor was it provided in a timely manner at the commencement of these discussions.
49. We agree with the FMA that there are insufficient records as to the suitability of the service for the client as is required by CS 9. While the Respondent has put forward some reasons in her submissions as to why the service was suitable for the client, in totality these are not documented in a sufficiently ordered or comprehensive manner as to adequately satisfy the requirement to record why the service was suitable.
50. Finally, we accept the FMA's submission that there are insufficient records in writing as to whether sufficient explanation was provided to allow the client to make an informed decision under CS 10. While the Respondent has provided evidence of "pink sheets", notes, drawings, risk analyses and other documents and has said in her evidence what was discussed and how it was explained to the client at various meetings, those discussions are not sufficiently recorded in writing to be readily comprehensible. For instance, a discussion about the volatility of the market (a key reason behind the recommendation by the Respondent to rebalance the portfolio, in an effort to remove some volatility) that the Respondent apparently held with the client was evidenced by a hand-drawn graph with no written explanation. While we accept that a sufficient verbal explanation may have been given to the client, that is insufficient to meet the Respondent's Code obligations.

#### **Client File 4**

51. In relation to Client File 4, whether a record dated 18 October 2018 regarding the shares in ProTen Limited was a personalised service and if it was, whether the Respondent took into account the client's particular circumstances or goals and if the records were adequate.
52. During September and October 2018, the client referred information to the Respondent regarding the proposed sale of his ProTen Limited shares pursuant to a scheme of arrangement. The Respondent denies these transactions are personalised service and submits that she was solely providing information, or in the alternative, that it was class service. The FMA submits that the Respondent provided financial advice which took into account certain of the client's financial goals and so was personalised service.
53. We note the FMA's submission that the retention of the Rio Tinto Limited shares (which the Respondent had previously accepted was personalised service, although at the hearing expressed some regret that she had accepted that) was interlinked with the sale of the ProTen shares. Given the contemporaneous nature of the discussions and advice given to the client we

are inclined to accept that view and therefore to find the ProTen share advice was personalised service.

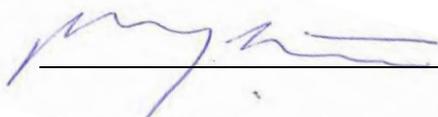
54. However even if the RioTinto and ProTen transactions were not interlinked, we agree that the advice given about sale of the ProTen shares was personalised service. The Respondent clearly knew and explained in her submissions and at the hearing that at least one of her client's goals was to get the best return he could on investments. We find that she provided her recommendations and opinions knowing and taking account of that goal. She provided personalised service.
55. Insufficient evidence was available as to adequacy of records, and there is no record of the scope or nature of the financial advice provided as required by CS 8. We therefore find that the Respondent's client file was inadequate and that a breach in respect of CS 12 is made out.
56. Also in respect of Client File 4 there was an issue as to whether the records dated 28 November 2018, 7 December 2018 and 22 February 2019, that the client acquire certain investments, were a personalised service:
  - a. Whether the Respondent provided a financial adviser service (i.e. financial advice) to the client;
  - b. Whether the Respondent took into account the client's particular financial circumstances or goals or the client reasonably expected the Respondent to have done so;
  - c. If a personalised service had been provided whether the records were adequate in relation to the scope of the financial service provided including limitations and explanations as to such limitation, research as to the state of the market and the suitability of the product.
57. The Respondent has provided the client with various services since 1988. It is accepted that she has never provided him with what she would describe as a "complete" or "fulsome" financial plan, which from her evidence, she would only ever do if she was in possession of a completed financial questionnaire, which she never received from him. From November 2018, the client was provided with brochures relating to Castle Point Trans-Tasman Fund, Castle Point Ranger Fund and Russell Investments Fixed Interest Fund. The Respondent submitted that these Funds were not aggressive funds and that she did not therefore take into account the client's stated goal of being as aggressive as possible.
58. The Respondent did provide the client with what she called a "limited advice record". The Respondent's evidence was that it was difficult for her clients to understand the terminology "class service" and she preferred this term. However from the evidence presented at cross-examination, it appears clear to us that actually the Respondent intended to provide the client limited personalised service. It was also apparent from evidence that the Respondent believed she was close to providing him a "complete" financial plan, and we find that her recommendations assumed the client's future goals. We find that the Respondent provided personalised service.
59. Given these findings, we conclude the Respondent had insufficiently recorded the scope of the financial service provided, including any limitations on her advice. Her records from the time are

confusing in terminology as they do not accord with the terminology in the Act. Using her templates and methodology at the time, it would be difficult to correctly document the requirement in CS 8 when providing either class service or limited personalised service.

60. There is no evidence that the Respondent sufficiently recorded in writing her research on the “state of the market” in relation to these funds, and nor is there any written record of the Respondent’s assessment of the suitability of the products for the client that would enable him to make an informed decision. This accords with the Respondent’s view that she was not providing personalised service. Therefore we conclude the obligations under CS 12 to adequately document the requirements of CS 10, were not met by the Respondent.

## **DISPOSITION**

61. As breaches of CS 12 and 15 have been established there must be a dispositive phase of the proceedings. Under Rule 28 of the Committee’s Procedure Rules, it notifies the Respondent that, for the reasons set out in this decision, the Committee may take any of the actions specified in sections 101(3) and 101(5) of the FAA. The parties are requested to make submissions to the Committee on what, if any, action it should take and to advise whether that party wishes to be heard on its submissions or to call evidence in relation to its submissions. The Complainant's submissions should be filed by Friday, 5 February 2021 and the Respondent’s submissions should be filed by Friday, 26 February 2021.
62. The interim order preventing publication of the name or identifying details of the Respondent is to continue until final disposition of the case and the question of permanent non-publication should be addressed by the parties in their submissions on disposition.



**Chairman, Sir Bruce Robertson**  
**For the Financial Advisers Disciplinary Committee**